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No. 673

# In the Supreme Court of the United States

OCTOBER TERM, 1964

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GIACOMO D'ANDREA, PETITIONER

*v.*

UNITED STATES IMMIGRATION and NATURALIZATION SERVICE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 132;[1] Pet. 25-26) is reported at 335 F. 2d 377.

### JURISDICTION

The judgment of the court of appeals was entered on August 17, 1964 (R. 131). A petition for rehear-

[1] "R." designates the consecutively paginated record now on file with the Clerk of this Court.

ing (R. 133-135) was denied on September 11, 1964 (R. 136). The petition for a writ of certior was filed on November 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether there was substantial evidence in the administrative record to support the order that petitioner be deported.

2. Whether petitioner was properly found to be statutorily ineligible for voluntary departure because he committed adultery within the five year period immediately preceding his application for such relief.

## STATUTES INVOLVED

The Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. 1101 *et seq.*, provides in pertinent part:

* * * *

Sections 241(a)(2), (c), 66 Stat. 204, 208 (8 U.S.C. 1251(a)(2), (c)):

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;
>
> * * * *

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 212(a), and to be in the United States in violation of this Act within the meaning of subsection (a)(2) of this section, if * * * (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

Section 212(a)(19) 66 Stat. 182-183 (8 U.S.C. 1182(a)(19)):

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

Section 244(e), 76 Stat. 1247, 1249 (8 U.S.C. 1254(e) (Supp. V)).

* * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a

person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Section 101(f)(2), 66 Stat. 166, 172 (8 U.S.C. 1101(f)(2):

* * * *

(f) For the purposes of this Act—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

* * * *

(2) one who during such period has committed adultery;

* * * *

## STATEMENT

Petitioner seeks review of a judgment affirming the decisions of the Board of Immigration Appeals that he was an alien subject to deportation and that he was statutorily ineligible for the discretionary relief of voluntary departure.

The relevant evidence adduced in the administrative proceedings may be summarized as follows:

Petitioner, a native and citizen of Italy, entered the United States as a non-quota immigrant in May 1960, on the basis of his marriage in November 1959 to Jennie D'Andrea (now Jennie Rotta) at Licata, Italy (R. 27). It was conceded by petitioner's counsel at the deportation hearing that petitioner never supported Jennie as his wife; that they never lived to-

gether as man and wife; and that their marriage was not consummated (see R. 4; Ex 1, R. 94-96). Petitioner claimed, however, that he did not enter into the marriage in order to evade the immigration laws.

At the time of the marriage, petitioner was 18 years old and Jennie Rotta was 52 (R. 9). She testified at the deportation hearing and a sworn statement previously made by her to the Immigration and Naturalization Service (Ex. 2, R. 97-101) was introduced into evidence. According to her account, petitioner's uncle and aunt wanted petitioner to come to the United States to live with them. They made arrangements for Jennie, who was related to petitioner by her former marriage (R. 62, Ex. 2, R. 98), to accompany a young American woman named Angela DeAngelo to Italy to see if the latter would marry petitioner (Ex. 2, R. 98-99). After a few months in Italy, Angela DeAngelo decided that she would not (R. 49, 66, Ex. 4, R. 104). Jennie then agreed to marry petitioner herself solely because his uncle had spent so much money on the trip to Italy and he and his wife were so anxious for petitioner to come to the United States (R. 51). She married him, she said, "just to bring him to the old folks" (R. 56). She testified that she never intended to live with petitioner as his wife (R. 59); that before the marriage she made it clear to petitioner and he agreed that the marriage would be terminated after he arrived in the United States (R. 59, 61, 62);[2] that she did not in-

[2] At one point in her testimony Jennie referred to petitioner as an "innocent bystander" to the marriage. She explained

tend to be his wife "in the full sense of the word" (R. 62); and that she decided to marry him and bring him to the United States "so that he could live with his aunt and uncle and after he got here if he wanted a divorce he could get the divorce and stay with his aunt and uncle and that was the whole purpose" (R. 60, 62).[3] She said that they never lived together as man and wife and that no attempt was made by either party to consummate the marriage (R. 58, Ex. 2, R. 99).

Jennie Rotta returned to the United States a few days after the marriage and made arrangements for petitioner to come here. When he arrived in this country, he stayed at Jennie's home in Erie, Pennsylvania until he received his immigration identification card (R. 56, 72, Ex. 2, R. 99.) On the day after he received his card he went to live with his uncle in Cleveland, Ohio. About three months later he returned to Jennie's home telling her that his uncle had thrown him out. She told him that he could not live with her "because that was not the idea in the first place"; that she was residing with her daughter who could not afford to support him; and that she "didn't want him as a husband just like he didn't want [her] as a wife" (Ex. 2, R. 99). He agreed to go back to his uncle but only after Jennie consented to divorce

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this by saying that she had initially prompted the marriage (R. 61).

[3] Angela DeAngelo informed immigration authorities that during the return trip from Italy Jennie told her that she did not intend to live with petitioner as his wife (R. 67, Ex. 4, R. 106).

him. She later filed suit for divorce but, without her prior knowledge, petitioner instituted a separate divorce proceeding in Cleveland and obtained a divorce in May 1962 (Ex. 2, R. 99; R. 45-46, 54-56).

Petitioner testified at the hearing that when he married Jennie he expected to have the usual husband and wife relationship with her and that he intended to remain married to her after he arrived in the United States (R. 69, 72, 75-76). He expected to but did not have sexual relations with her (R. 69).[4] He claimed that he tried to live with her as her husband but that she refused (R. 76-78). In June 1962, petitioner married Angela Dottore, who had borne him a child in May 1961; a second child was born in August 1962. He testified that he had met his present wife in Italy before his marriage to Jennie and that she had been living with Jennie when he arrived in this country but had later gone to live with his uncle (R. 82-90).

At the termination of the hearing, petitioner applied for voluntary departure in lieu of deportation if he was found deportable (R. 90).

The Special Inquiry Officer concluded that petitioner and his first wife had both been "clearly aware" that their marriage was for the sole purpose of gaining petitioner entry into the United States and that

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[4] The reason he gave for this was that Jennie insisted that they first have a church marriage. He testified that she refused to have a church wedding in Italy because she had to return to the United States where her daughter was expecting a baby and did not have time to prepare for a church wedding. After he arrived in the United States, she refused to have a church wedding until he obtained a job (R. 70-72).

they had no intention of residing together as man and wife (R. 35). Accordingly, he found that petitioner was deportable under Section 241(a)(2) and 241(c) of the Immigration and Nationality Act. He denied petitioner's request for voluntary departure on the ground that petitioner was ineligible for such relief under Section 244(e) of the Act, since he had committed adultery during the preceding five year period and under Section 101(f)(2) could not be deemed a person of good moral character (R. 36-38). The Board of Immigration Appeals affirmed (R. 8-12; Pet. App. 21-25), resting its conclusion regarding deportability on the following factors (R. 12; Pet. 24-25):

> * * * the wide disparity in ages between the parties, the failure of Jennie to introduce [petitioner] as her husband, the failure to consummate the marriage, the departure of the [petitioner] for Cleveland after he obtained his immigration document showing entry for permanent residence, the adulterous relationship he started in Cleveland, and the corroboration Jennie's testimony has received.

## ARGUMENT

1. The administrative findings of fact are conclusive if "supported by reasonable substantial, and probative evidence on the record considered as a whole." Section 106(a)(4), Immigration and Nationality Act, added by 75 Stat. 651, 8 U.S.C. 1105a (a)(4) (Supp. V). It is clear that the findings in this case meet that test. All the pertinent facts point

to the conclusion that petitioner knowingly entered into the marital agreement solely for the purpose of gaining entry into the United States as a non-quota immigrant. The conflict between the testimony of petitioner and his first wife concerning the purpose of the marriage was resolved against petitioner by the Special Inquiry Officer. Apart from the uncontested facts which point to this conclusion, his first wife's testimony was corroborated to some extent by the testimony of Angela DeAngelo, who had accompanied her to Italy. The court below properly declined to substitute its judgment for that of the Special Inquiry Officer on the credibility of witnesses. See *Todaro* v. *Pederson*, 205 F. Supp. 612, 614 (N.D. Ohio), affirmed, 305 F. 2d 377 (C.A. 6), certiorari denied, 371 U.S. 891; *In re Cartellone*, 148 F. Supp. 676, 681 (N.D. Ohio), affirmed *sub nom. Cartellone* v. *Lehmann*, 255 F. 2d 101 (C.A. 6), certiorari denied, 358 U.S. 867.

2. Under Section 244(e) of the Act, the Attorney General may permit a deportable alien to depart voluntarily if the alien has been "a person of good moral character for at least five years immediately preceding his application" for such relief. Section 101(f)(2) provides that no person shall be considered to be of good moral character for a period during which he has committed adultery. Since petitioner committed adultery during the five years prior to his application for voluntary departure, his two children by his second wife having been conceived while he was still

married to his first wife, he was not eligible for voluntary departure under the statute.[8]

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[8] The Ohio statute on which petitioner relies (Pet. 14-16) makes it a crime to "*cohabit* in a state of adultery or fornication [emphasis added]," O.R.C. Sec. 2905.08. See *State* v. *Brown*, 47 Ohio 102, 105-106. Assuming the doubtful proposition that the element of cohabitation which is required to make out a crime under this statute has some relevance to the application to this case of Section 101(f)(2) of the Immigration and Nationality Act (which speaks only of "adultery"), there was sufficient evidence of cohabitation. While petitioner was still married to Jennie Rotta, he and his present wife both lived at his uncle's home. One child was born to them and another was conceived before petitioner and Jennie Rotta were divorced. Petitioner and his present wife were married a month after the divorce.

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